

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 3916 OF 2016

Alok Sharma & Ors.

...Petitioners

Versus

The State of Maharashtra & Anr.

... Respondents

**WITH
WRIT PETITION NO. 3917 OF 2016**

Alok Sharma & Anr.

...Petitioners

Versus

The State of Maharashtra & Anr.

... Respondents

**WITH
WRIT PETITION NO. 3918 OF 2016**

Alok Sharma & Ors.

...Petitioners

Versus

The State of Maharashtra & Anr.

... Respondents

**WITH
WRIT PETITION NO. 2916 OF 2018**

Alok Sharma & Ors.

...Petitioners

Versus

The State of Maharashtra & Anr.

... Respondents

Mr.Monish Bohra i/b. Mr.A.S.Khan and Associates for the Petitioners in all Petitions.

Mrs.Veera Shinde, APP for Respondent No.1-State.

Mr.Harshad Bhadbade a/w. Ms.Benedicta Lobo and Ms.Nimisha Ghetla for Respondent No.2.

CORAM : MRS. MRIDULA BHATKAR, J.
DATE : 28 NOVEMBER 2018

P.C.:

1. Rule. Rule made returnable forthwith. By consent of the parties, the Petitions are heard finally and disposed of at the stage of admission.

2. In Writ Petition No. 3916 of 2016, the order dated 16.06.2014 passed by the learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai, issuing process for the offence punishable under section 138 read with 141 of the Negotiable Instrument Act ("the N.I.Act") in C.C.No. 3192/SS/2013 and also the subsequent order dated 12.08.2016 passed by the learned Additional Sessions Judge, Gr. Mumbai, rejecting the application for condonation of delay of 504 days in filing the revision application, are challenged.

3. In Writ Petition No. 3917 of 2016, the order dated 16.06.2014 passed by the learned Metropolitan Magistrate, 33rd Court, Ballard Pier,

Mumbai, issuing process for the offence punishable under section 138 read with 141 of the N.I. Act in C.C. No.1564/SS/2014 and also the subsequent order dated 12.08.2016 passed by the learned Additional Sessions Judge, Gr. Mumbai, rejecting the application for condonation of delay of 504 days in filing the revision application, are challenged.

4. In Writ Petition No. 3918 of 2016, the order dated 16.06.2014 passed by the learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai, issuing process for the offence punishable under section 138 read with 141 of the N.I. Act in C.C.No. 4111/SS/2013 and also the subsequent order dated 12.08.2016 passed by the learned Additional Sessions Judge, Gr. Mumbai, rejecting the application for condonation of delay of 504 days in filing the revision application, are challenged.

5. In Writ Petition No. 2916 of 2018, the order dated 13.09.2013 passed by the learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai, issuing process for the offence punishable under section 138 read with 141 of the N.I. Act in C.C.No. 1575/SS/2013 and also the subsequent order dated 07.02.2017 passed by the learned Additional Sessions Judge, City Civil & Sessions Court, Gr. Bombay, dismissing the application for condonation of delay of 909 days in filing the revision application, are challenged.

6. The complainant had filed a complaint in the year 2014 and the petitioners became aware of the criminal case on 05.08.2014. The complaint was returned on the ground of territorial jurisdiction to file it before another Metropolitan Magistrate Court. However, it was not the rejection of the complaint, but it was refiled in the same Court on 01.10.2015 and, therefore, the petitioners lost their track. Thereafter, petition Nos. 822 of 2016, 823 of 2016 and 824 of 2016 were filed by the petitioners in this Court. By an order dated 03.05.2016, this Court had specifically ordered that the petitioners are having substantive alternate remedy by way of revision before the Sessions Court, to challenge the process and, therefore, in view of the parameters and guidelines laid down by the Supreme Court in the case of ***Shalini S. Shetty vs. Rajendra S. Patil*** reported in ***(2010) 8 SCC 329***, the petitions were not maintainable and hence, the learned counsel for the petitioners sought leave to withdraw the petitions with liberty to adopt the appropriate remedy. The liberty was granted by this Court and thereafter, the revision applications along with misc. applications for condonation of delay had been filed. By an order dated 12.08.2016, the learned Additional Sessions Judge rejected the applications for condonation of delay.

7. The learned counsel for the petitioners has submitted that the orders of dismissal of the applications for condonation of delay passed by the learned Additional Sessions Judge are illegal. He has further submitted that the learned Additional Session Judge ought to have taken into account certain facts for causing delay. He has further submitted that the learned Additional Sessions Judge ought to have considered that the petitioners i.e., the applicants in the sessions case, have very good case on merits, as they are independent directors of the company and they are not responsible for conducting business and day to day activities of the company and, therefore, they cannot be deemed to be held guilty for the offence under Section 138 of the N.I.Act. He has further submitted that in these petitions, the petitioners are not only challenging the dismissal orders of condonation of delay, but also challenging the orders of issuance of process and, therefore, they are to be allowed. In support of his submissions, he has relied on the judgment of the Supreme Court dated **11th December, 2013** in ***Criminal Appeal No. 2083 of 2013*** in the case of ***Kamlesh Kumar Vs. State of Bihar & Anr.*** He has also relied on the judgment of the ***Supreme Court dated 1st July, 2013*** in ***Criminal Appeal No. 813 of 2013*** in the case of ***Mrs.Aparna A. Shah Versus M/s. Sheth Developers Pvt. Ltd. & Anr.***

The learned counsel while relying on the judgment of the **Supreme Court dated 04.08.2014 in Criminal Appeal No. 1692 of 2014** and another connected Appeal **in the case of Nandkumar & Ors. Versus M/s. ECE Industries Ltd**, has submitted that the process cannot be issued against an independent non executive director. He has further relied on the judgment of this Court **dated 12.10.2015 in Criminal Writ Petition No. 348 of 2014** and connected group of petitions in the case of **Shantanu Narayan Rooj v/s. The State of Maharashtra & Anr.** He has further relied on the judgment of this Court **dated 10.02.2015 in Writ Petition No. 834 of 2014** and connected group of petitions in the case of **Alok Sharma & Ors. Versus State of Maharashtra & Ors.** He has further relied on the similar order passed by the learned Single Judge of this Court on **12.10.2015 in Writ Petition Nos. 4095 and 4096 of 2014** in the case of **Alok M.Sharma & Ors. v/s. The State of Maharashtra & Anr.**, and also relied on the order of this Court **dated 13.07.2016 in Criminal Petition Nos. 827 and 2210 of 2016** in the case of **Samar Ray and Anr vs. The State of Maharashtra & Anr.**

He has further submitted that this Court already in Writ Petition No. 834 of 2014 has held that the petitioners are independent directors. He has also relied on the order of **this Court dated 27.09.2018 in Writ**

Petition Nos. 3131 to 3133 of 2015, which were filed by the present petitioners. In the said petitions, the learned Single Judge of this Court has also held that the petitioners are independent directors and, therefore, they cannot be prosecuted under Section 138 read with 141 of the N.I.Act, and the petitions were allowed and the process was quashed. He has further submitted that in view of these orders of the Bombay High Court, no other view can be taken, but other complaints also be quashed.

8. The learned counsel for respondent No.2 has submitted that the learned counsel for the petitioners cannot argue on merits at this stage because criminal revision applications were not admitted by the Sessions Court and the delay was not condoned hence, these petitions cannot be entertained. He has further submitted that the petitioners had knowledge about issuance of the process very soon. After filing of the complaint, they appeared before the Metropolitan Magistrate Court in the year 2014 itself. However, nearly 1 and ½ years were taken by the petitioners for challenging the process. He has further submitted that these petitions were filed deliberately to give a go-bye to the fact of delay. He has further submitted that this Court had directed to go before the Sessions Court, but there also, the petitioners failed to explain the delay and, therefore, it had been rightly dismissed.

He has argued that in Criminal Writ Petition No. 834 of 2014 and connected group of petitions and in Writ Petition Nos. 3131 to 3133 of 2015, the respondents have admitted the status of the petitioners as independent directors. However, the present complainant, who is a different complainant from the other complainants, has not admitted that the present petitioners are independent directors. In support of his submissions, he has relied on Form No. 32 filled up by Alok Sharma wherein his designation is mentioned as director and not mentioned as an independent director. There are also certain discrepancies in the dates of the resolutions and the reasoning.

9. Heard submissions.

10. In the case of **Kamlesh Kumar** (*supra*), the appellant was facing trial in the complaint filed by respondent No.2 under section 138 of the N.I.Act. After framing of charge, the petition under section 482 of the Code of Criminal Procedure was filed before the High Court of Judicature at Patna. The Supreme Court has held that framing of charge is not a bar to decide the petition under section 482 of the Code of Criminal Procedure. The Supreme Court had again gone into the merits of the matter and quashed the process. In the said matter, a point was made that the complainant though had knowledge of dishonouring the cheque on 10.11.2008, sent legal notice on 17.12.2008 i.e., beyond 30 days contemplated under section 138 of the N.I Act and, therefore, on this point, the petition was allowed.

11. In the case of **Mrs.Aparna A. Shah** (*supra*), the Supreme Court has held that only the drawer of the cheque can be prosecuted under Section 138 of the N.I. Act. In the said case, admittedly, the appellant was not the drawer of the cheque. The names of the appellant and her husband are shown on the cheque, but her husband alone has signed it. A joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. Thus, it held that section 141 of the N.I.Act on this point is an exception. The Supreme Court has further held that, “the culpability attached to dishonour of a cheque can, in no case “except in case of Section 141 of the N.I.Act” be extended to those on whose behalf the cheque is issued” and, therefore, appeal was allowed and the process was quashed.

12. In the case of **Shantanu Narayan Rooj** (*supra*), the learned Single Judge of this Court quashed the process in all criminal complaints by accepting that the petitioner was no longer incharge of the company for its day to day affairs and the petitioner is not liable for prosecution for the offence under section 138 with the aid of 141 of the N.I.Act.

13. In **Writ Petition No. 834 of 2014 and connected group of petitions**, the issue was determined that, whether the independent director can be prosecuted for the offence punishable under section 138 of the

N.I.Act with the help of section 141 of the N.I. Act, as the petitioners are admittedly independent directors of the company viz.Glodyne Technoserve Ltd. This Court has noted down that, an independent director in relation to the company is a director other than a managing director or a whole time director or a nominee director, who in the opinion of Board is a person of integrity and possesses relevant expertise and experience and thus, independent director is not responsible for the company's day to day conduct and, therefore, the learned Single Judge discharged the appellants in the criminal cases mentioned in the appeal, which was the subject of that petition against the present petitioners.

14. In **Criminal Writ Petition Nos. 4095 and 4096 of 2014**, the learned Single Judge of this Court has relied on the judgment dated 10.02.2015 passed by this Court in Criminal Writ Petition No. 834 of 2014 and connected group of petitions and have admitted the petitions.

15. Similarly, in **Criminal Petition Nos. 827 and 2210 of 2016**, the learned Single Judge of this Court has relied on the judgment dated 10.02.2015 passed by this Court in Criminal Writ Petition No. 834 of 2014 and connected group of petitions and have admitted the petitions.

16. It is to be noted that there is a delay of 504 days and 909 days. It is not a delay of a short period. The period after filing of the earlier petitions in the High Court, wherein the order dated 03.05.2016 was passed by this Court directing to take appropriate proceedings with alternate remedy is excluded. It is necessary for the parties to explain the delay. As the petitioners were prosecuting the matter before the High Court, that period can be condoned yet the long period of delay is unexplained. After issuing the process and filing the petitions, there is a delay of nearly 1 and ½ years. It is necessary to give sufficient reasons for the delay. No reason is given for delay and, therefore, the learned Sessions Judge rightly dismissed the revisions on the ground of delay. The prayer of quashing of process in the present petitions cannot be entertained. It was necessary for the parties to follow proper procedure laid down under the law. In the absence of earlier petition, this Court might have considered and gone into the prayer of quashing process, however, when this Court has specifically directed the petitioners to approach revision applications first before the Sessions Court, I am not inclined to deal these petitions on merits. Hence, all these petitions are dismissed on the ground of delay.

17. The cases filed against the same accused persons are for different period by various complainants. The ratio laid down in various cases, as

mentioned above, is only on the statutory provision of section 141 of the N.I.Act. The ratio cannot be useful when the matter is argued only on the point of condonation of delay.

(MRIDULA BHATKAR, J.)